

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Darla Padgett, et al.,

NO. C 04-03946 JW

Plaintiffs,

**ORDER OVERRULING DEFENDANTS'  
OBJECTIONS TO RECOMMENDED  
DISCOVERY ORDER NO. 32**

v.

Brian Loventhal, et al.,

Defendants.

The parties have been working through a Special Master to complete discovery. On August 19, 2008, the Special Master issued Discovery Order Number 32. (See Docket Item No. 541.) Presently before the Court is Defendants' Objections to Discovery Order Number 32. (Defendants' Objections and Request for District Court to Reconsider Special Master's Discovery Order No. 32, hereafter, "Objection," Docket Item No. 544.)

Discovery Order Number 32 concerns disputes over (1) whether Defendants should bear the expense of having Plaintiffs' expert Bates stamp documents that have already been stamped with Defendants' "Berryhill" numbers; (2) whether Defendants should have to review and produce BAK and DAT files that they have collected; and (3) whether Plaintiffs should be required to return materials alleged by Defendants to be privileged.

**A. Bates Stamps**

The Special Master ordered as follows:

on a review of all material submitted to the Special Master, as well as oral argument . . . the appropriate labeling system for the material produced from the imaging process is that utilized by Mr. Cooper. Going forward, for use in any discovery practice and at trial, it

will be the Cooper labeling system that will be utilized. All material produced in connection with the computer imaging process shall be available at [the] time of trial in electronic form and shall be readily identifiable and searchable in that form.

(Discovery Order Number 32 at 3.)

On May 11, 2007, the Court ordered Defendants to bear the expense of having Plaintiffs' expert Bates stamp documents. Certain documents were stamped by Defendants using "Berryhill" numbers because they were given to Defendants by Plaintiffs' expert without Bates numbers. (Objection at 7.) On this basis, Defendants contend that they should not have to pay for these documents to be re-numbered.

The issue of Bates numbering is properly within the Special Master's discretion. (See Docket Item No. 306.) In order for this case to have an orderly trial and for discovery to proceed in an organized fashion, a uniform numbering system is required. Thus, there is nothing that suggests the Special Master has abused his discretion.

Accordingly, the Court OVERRULES Defendants' first objection to Discovery Order Number 32.

**B. Review and Production of BAK and DAT Files**

The Special Master ordered Defendants to review immediately all BAK and DAT files that have been collected, and produce a privilege log within ten days. (Discovery Order Number 32 at 3.) Defendants contend that they have not been able to create readable versions of these files and that the effort required to do so would be wasteful because they do not contain relevant material. (Objection at 6.)

As the Special Master stated in the order, these files "were not excepted from those to be searched and produced and are to be made available . . . ." (Discovery Order Number 32 at 3.) The Special Master has been given authority to resolve all discovery disputes in this matter. Here, the Special Master has determined that these files may contain relevant documents and must be searched.

Accordingly, the Court OVERRULES Defendants' second objection to Discovery Order Number 32.

1 **C. Return of Privileged Material**

2 The Special Master denied Defendants' request that Plaintiffs return certain documents  
3 claimed by Defendants to be privileged. Defendants contend that Plaintiffs have come into the  
4 possession of privileged documents through their expert, and that it is beyond the Special Master's  
5 discretion to allow Plaintiffs to keep such documents. (Objection at 2-3.)

6 The Special Master provided the following explanation as to why no documents need to be  
7 returned to Defendants:

8 [Defendants] request that all imaged material (not just the privilege material) be returned to  
9 them and, essentially, that the imaging process be redone. . . . Defendants have provided  
10 absolutely no information that [Plaintiffs' expert] has *inappropriately* released any  
11 privileged materials to Plaintiffs. Rather, it seems very clear from the record that to the  
12 extent any privilege material has been provided to plaintiffs, it has been the direct result of  
13 Defendants' incomplete privilege logs. . . . The Special Master finds no basis for  
14 "undoing" the imaging process and finds, further, that it should go forward pursuant to the  
15 guidelines already established.


16 (Discovery Order Number 32 at 3-4.)

17 In light of the Special Master's finding that Plaintiffs' expert has not inappropriately released  
18 privileged material and his implication that returning documents would be impracticable, the Court  
19 **OVERRULES** Defendants' third objection to Discovery Order Number 32.

20 To the extent Defendants have evidence that Plaintiffs' expert did not follow the designated  
21 protocol for discovery in this case, they may renew their Objection.

22 In sum, the Court **OVERRULES** Defendants' Objections to the Special Master's  
23 Recommended Discovery Report No. 32

24 Dated: October 2, 2008

25   
26 JAMES WARE  
27 United States District Judge  
28

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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5 **Dated: October 2, 2008**

**Richard W. Wieking, Clerk**

6  
7 **By: /s/ JW Chambers**  
8 **Elizabeth Garcia**  
9 **Courtroom Deputy**  
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